

By: Phelan

H.B. No. 3742

Substitute the following for H.B. No. 3742:

By: Larson

C.S.H.B. No. 3742

A BILL TO BE ENTITLED

AN ACT

relating to the procedure for action by the Texas Commission on Environmental Quality on an application for a new or amended water right.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 5.115, Water Code, is amended by amending Subsection (b) and adding Subsection (h) to read as follows:

(b) At the time an application for a permit or license under this code, other than an application for a water right or an amendment to a water right under Chapter 11, is filed with the executive director and is administratively complete, the commission shall give notice of the application to any person who may be affected by the granting of the permit or license. At the time an application for a water right or an amendment to a water right under Chapter 11 is filed with the executive director and is technically complete, the commission shall give notice as required by law. A state agency that receives notice under this subsection may submit comments to the commission in response to the notice but may not contest the issuance of a permit or license by the commission. For the purposes of this subsection, "state agency" does not include a river authority.

(h) Subsections (a) and (a-1) do not apply to a hearing on an application for a water right or an amendment to a water right under

1 Chapter 11.

2 SECTION 2. Section 11.1273(d), Water Code, is amended to
3 read as follows:

4 (d) The commission shall provide an opportunity for public
5 comment and a contested case [~~public~~] hearing on the application,
6 consistent with the process for other water rights applications.

7 SECTION 3. Sections 11.132(a), (c), and (d), Water Code,
8 are amended to read as follows:

9 (a) Notice shall be given as provided by commission rule to
10 a person [~~to the persons~~] who in the judgment of the commission
11 should receive notice [~~may be affected by an application, including~~
12 ~~those persons listed in Subdivision (2), Subsection (d), of this~~
13 ~~section~~]. The commission, on the motion of a commissioner or on the
14 request of the executive director, the applicant, or any affected
15 person, shall hold a contested case [~~public~~] hearing on the
16 application.

17 (c) In the notice, the commission shall:

18 (1) state the name and address of the applicant;

19 (2) state the date the application was filed;

20 (3) state the purpose and extent of the proposed
21 appropriation of water;

22 (4) identify the source of supply and the place where
23 the water is to be stored or taken or diverted from the source of
24 supply;

25 (5) describe the process by which the commission will
26 consider the application [~~specify the time and location where the~~
27 ~~commission will consider the application~~]; [~~and~~]

1 (6) provide notice that, not later than the 30th day
2 after the date of the notice, a person described by Subsection (a)
3 may:

4 (A) request a contested case hearing; or

5 (B) submit:

6 (i) comments on the application; or

7 (ii) disputed issues of fact or mixed
8 questions of fact and law that are relevant and material to the
9 decision on the application;

10 (7) describe the process for the requests and
11 submissions described by Subdivision (6); and

12 (8) give any additional information the commission
13 considers necessary.

14 (d) The commission may act on the application without
15 holding a contested case [~~public~~] hearing if:

16 (1) not less than 30 days before the date of action on
17 the application by the commission, the applicant has published the
18 commission's notice of the application at least once in a newspaper
19 regularly published or circulated within the section of the state
20 where the source of water is located, if published notice is
21 required by commission rule;

22 (2) not less than 30 days before the date of action on
23 the application by the commission, the commission mails a copy of
24 the notice by first-class mail, postage prepaid, to all persons to
25 whom notice is required to be mailed under commission rules adopted
26 under Subsection (a) [+]

27 [~~(A) each claimant or appropriator of water from~~

~~the source of water supply, the record of whose claim or appropriation has been filed with the commission; and~~

~~[(B) all navigation districts within the river basin concerned]; and~~

(3) within the period specified in the ~~[30 days after the date of the newspaper publication of the commission's]~~ notice:

(A) ~~[7]~~ a contested case ~~[public]~~ hearing has not been requested in writing by a commissioner, the executive director, the applicant, or an affected person; or

(B) no disputed issue of fact or mixed question of fact and law that is relevant and material to the decision on the application has been submitted by the applicant or an affected person ~~[who objects to the application]~~.

SECTION 4. Subchapter D, Chapter 11, Water Code, is amended by adding Section 11.1321 to read as follows:

Sec. 11.1321. AFFECTED PERSON. (a) In this section, "timely" means within the 30-day notice period described by Section 11.132.

(b) For the purpose of an administrative hearing held by or for the commission involving a contested case under this chapter, "affected person," "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

(c) Unless an application is referred to the State Office of

Administrative Hearings under Section 11.133(a), the commission shall determine whether a person is an affected person at a public meeting of the commission.

(d) The commission shall make a determination that a person is an affected person regarding the application if the person:

(1) is the applicant; or

(2) has timely submitted one or more disputed issues of fact or mixed questions of fact and law that are relevant and material to the decision on the application and have the potential to affect the justiciable interest asserted by the person, and the person:

(A) owns or leases a permit, certified filing, certificate of adjudication, or other water right recognized under this chapter in the same basin as the basin affected by the application;

(B) has an administratively complete application pending before the commission for a new or amended water right in the same basin as the basin affected by the application;

(C) has an application pending before the commission for a change of ownership of a water right in the same basin as the basin affected by the application; or

(D) is otherwise an affected person under Subsection (b).

(e) The following are not affected persons:

(1) a group or association that does not:

(A) timely request a contested case hearing; and

(B) identify by name and physical address or

1 location a member of the group or association who would be an
2 affected person in the person's own right;

3 (2) a hearing requestor, even if otherwise an affected
4 person, who did not timely submit in writing a disputed issue of
5 fact or mixed question of fact and law that is relevant and material
6 to the decision on the application; or

7 (3) a person, even if otherwise an affected person,
8 who did not timely request a contested case hearing.

9 (f) For a person other than those described by Subsection
10 (d)(1), (d)(2)(A), (d)(2)(B), (d)(2)(C), or (e), the commission
11 shall make a determination regarding whether a person is an
12 affected person by considering:

13 (1) the likely impact of approving the application on
14 the health, safety, and use of the property of the hearing
15 requestor, to the extent the impact relates to issues within the
16 commission's jurisdiction;

17 (2) the administrative record, including the permit
18 application, public comments, hearing requests, related filings,
19 and any supporting documentation;

20 (3) the analysis and opinions of the executive
21 director;

22 (4) any other expert reports, affidavits, opinions, or
23 data submitted on or before any applicable deadline to the
24 commission by the executive director, the applicant, or a hearing
25 requestor; and

26 (5) any other factors the commission considers
27 relevant.

SECTION 5. Section 11.133, Water Code, is amended to read as follows:

Sec. 11.133. CONTESTED CASE HEARING ON APPLICATION. (a) If an applicant requests that the applicant's application be referred to the State Office of Administrative Hearings for a contested case hearing, the commission shall refer the application to the office.

(b) If the commission determines at a public meeting of the commission that a contested case hearing has been requested by an affected person, the commission shall either:

(1) hold a contested case hearing on the application before the commission at a time and place designated by the commission; or

(2) refer the application to the State Office of Administrative Hearings.

(c) ~~[At the time and place stated in the notice, the commission shall hold a hearing on the application.]~~ Any affected person may appear at the contested case hearing in person or by attorney or may enter the person's ~~[his]~~ appearance in writing. Any affected person who appears may present objection to the issuance of the permit. The commission or the State Office of Administrative Hearings may receive evidence, orally or by affidavit, in support of or in opposition to the issuance of the permit, and ~~[it]~~ may hear arguments. Chapter 2001, Government Code, applies to a contested case hearing held under this section.

(d) The commission may not refer an issue regarding an application for a contested case hearing under Subsection (b) unless the commission determines that the issue:

1 (1) is a disputed issue of fact or mixed question of
2 fact and law;

3 (2) is relevant and material to a decision on the
4 application; and

5 (3) was raised by an affected person whose hearing
6 request was granted by the commission.

7 (e) If the commission grants a request for a contested case
8 hearing under Subsection (b), the commission shall:

9 (1) determine the number and scope of issues to be
10 referred for a hearing; and

11 (2) consistent with the nature and number of issues to
12 be considered at the hearing, specify the maximum expected duration
13 of the proceeding, beginning with the holding of the preliminary
14 hearing and concluding with the issuance of the proposal for
15 decision, which may not exceed a period of 270 days, unless the
16 commission determines that the nature and number of issues to be
17 considered at the hearing require that the period be extended.

18 (f) The administrative law judge who conducts the contested
19 case hearing or the commission, if the commission conducts the
20 hearing, may extend the proceeding beyond the period specified by
21 the commission under Subsection (e)(2) if:

22 (1) the parties to the hearing agree to an extension;
23 or

24 (2) the administrative law judge or the commission, if
25 the commission conducts the hearing, determines that failure to
26 extend the proceeding would deprive a party of due process or
27 another constitutional right.

1 (g) For the purposes of Subsection (f)(2), a political
2 subdivision has the same constitutional rights as an individual.

3 (h) If the commission refers an application for a contested
4 case hearing under Subsection (a), the administrative law judge who
5 conducts the hearing:

6 (1) may not grant party status to:

7 (A) a person who is not an affected person under
8 Section 11.1321; or

9 (B) a person whose hearing request was denied by
10 the commission; and

11 (2) shall determine the number and scope of issues to
12 be considered at the hearing in accordance with the limitations
13 contained in Subsection (d).

14 (i) Subsection (h)(1) does not apply to the office of public
15 interest counsel or the executive director.

16 (j) In the event of a conflict between this section and any
17 other law, this section prevails.

18 SECTION 6. Sections 11.143(d) and (g), Water Code, are
19 amended to read as follows:

20 (d) Except as otherwise specifically provided by this
21 subsection, before the commission may approve the application and
22 issue the permit, it shall give notice and hold a hearing as
23 prescribed by this section. The commission may act on the
24 application without holding a contested case [~~public~~] hearing if:

25 (1) not less than 30 days before the date of action on
26 the application by the commission, the applicant has published the
27 commission's notice of the application at least once in a newspaper

1 regularly published or circulated within the section of the state
2 where the source of water is located;

3 (2) not less than 30 days before the date of action on
4 the application by the commission, the commission mails a copy of
5 the notice by first-class mail, postage prepaid, to each person
6 whose claim or appropriation has been filed with the commission and
7 whose diversion point is downstream from that described in the
8 application; and

9 (3) within 30 days after the date of the newspaper
10 publication of the commission's notice, a contested case [~~public~~]
11 hearing is not requested in writing by a commissioner, the
12 executive director, or an affected person who objects to the
13 application.

14 (g) If on the date specified in the notice prescribed by
15 Subsection (d) [~~of this section~~], the commission determines that a
16 contested case [~~public~~] hearing must be held, the matter shall be
17 remanded for hearing without the necessity of issuing further
18 notice other than advising all parties of the time and place where
19 the hearing is to convene.

20 SECTION 7. Section [11.174](#), Water Code, is amended to read as
21 follows:

22 Sec. 11.174. COMMISSION MAY INITIATE PROCEEDINGS. When the
23 commission finds that its records do not show that some portion of
24 the water has been used during the past 10 years, the executive
25 director may initiate proceedings, terminated by contested case
26 [~~public~~] hearing, to cancel the permit, certified filing, or
27 certificate of adjudication in whole or in part.

1 SECTION 8. Section [11.132](#)(f), Water Code, is repealed.

2 SECTION 9. (a) As soon as practicable after the effective
3 date of this Act, the Texas Commission on Environmental Quality
4 shall adopt rules to implement the changes in law made by this Act.

5 (b) The changes in law made by this Act apply only to an
6 application for a new or amended water right received by the Texas
7 Commission on Environmental Quality on or after the effective date
8 of the rules adopted under Subsection (a) of this section. An
9 application received before the effective date of the rules adopted
10 under Subsection (a) of this section is governed by the law in
11 effect on the date the application was received, and the former law
12 is continued in effect for that purpose.

13 SECTION 10. This Act takes effect immediately if it
14 receives a vote of two-thirds of all the members elected to each
15 house, as provided by Section [39](#), Article III, Texas Constitution.
16 If this Act does not receive the vote necessary for immediate
17 effect, this Act takes effect September 1, 2017.